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No. 06-667

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IN THE

Supreme Court of the United States

JUSTINE MALDONADO,
Petitioner,

v.

FORD MOTOR COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Michigan Supreme Court

REPLY BRIEF

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STATEMENT OF FACTS

Ford claims that the Michigan Supreme Court majority properly found that the plaintiff and her attorneys violated a trial court's "order" by making statements to the media about Daniel Bennett's prior conviction for indecent exposure and about the facts underlying that conviction.

In silence, however, Ford does not defend the Supreme Court's numerous claims that the plaintiff or her attorneys made "repeated" statements to the media about those subjects. In silence, Ford agrees that the petitioner and her counsel made one statement each on that subject to the media. Pet. For Cert. 10.

Nor does Ford dispute that the supposed "order" consisted of nothing more than an admonition to counsel to comply with the "ethical obligations" that governed the conduct of attorneys. There is, however, only one ethical rule in Michigan that applies to public comments by attorneys—Rule 3.6 of the Michigan Rules of Professional Conduct. That obligation, which Ford never quotes, provides as follows:

> A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

App. 103a.

Of all of the statements cited by Ford in its brief, there is *exactly one* that even falls in the category of statements that could be governed by Rule 3.6—the September 11, 2001, press release issued by plaintiff's counsel.

But instead of analyzing that statement, Ford has repeated every public or semi-public statement made by the plaintiff, by her attorneys, by the media, or by third parties. Ford Br. 3-9. Unless Ford is simply attempting to prejudice the Court by citing irrelevant material, it must believe that *every* public

statement by the plaintiff or her attorneys is either a violation of Rule 3.6 or evidence of a violation of Rule 3.6.

If Ford alone held that view, it would be disturbing. But as a review of the majority Opinion below demonstrates, the Michigan Supreme Court has adopted the same approach. App. 4a, n. 5; 6a, n. 9.

Far from providing a reason for this Court to deny the writ, Ford's Brief provides ample reasons why this Court should grant the writ.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE MICHIGAN SUPREME COURT CONFLICTS WITH DECISIONS BY THE SECOND, THIRD, SIXTH, SEVENTH, NINTH AND ELEVENTH CIRCUITS AND WITH DECISIONS BY THE HIGHEST COURTS OF ILLINOIS, MARYLAND, MONTANA, NEW MEXICO, AND OHIO.

As set forth in the Petition, the decision of the Michigan Supreme Court majority conflicts with decisions by six federal circuits and five state supreme courts setting forth the minimum procedural requirements that must be followed by a trial court before it restricts speech about pending cases by parties or by their attorneys. Pet for Cert, 14-17.

In its response, Ford claims that "almost none" of petitioner's cases apply to the situation presented here, because, it says, those cases govern the standards for imposing a "prior restraint," which, supposedly, is not at issue here. Ford Br. 17.

But this case does not turn on the definition of a "prior restraint." According to the majority of the Michigan Supreme Court, the trial judge's comments from the bench were the *equivalent* of an order restraining speech by the plaintiff and her attorneys:

> The transcript of the exchange, which we have set forth on pages 9 to 11 of this opinion [App. 7a-9a], makes it quite clear that *the parties were advised in no uncertain terms that references to the excluded conviction were to*

> *cease.* Contrary to Justice Cavanagh's assertion, Judge Giovan [the trial judge] *explicitly warned the parties and the attorneys that that further reference to the excluded conviction would result in dismissal.*

App. 20a, n. 23 (emphasis added).

In fact, the Supreme Court majority, quoting the trial judge, makes clear that no order restraining speech was even necessary because *Rule 3.6 was in and of itself equivalent to a gag order issued by a court*:

> So, what I say, *I'm not going to issue a gag order because the rules of professional conduct already have a standard that bind you.* So, why should Judge Giovan . . . select his own criteria for what people should say *when we have standing rules that govern what attorneys are permitted to say*?

App. 19a, n. 22 (emphasis added).

The words of the Michigan Supreme Court make the conflict between its decision and that of six circuits and five state supreme courts clear, obvious, and direct.

In six federal circuits and five states, a trial judge may not enter an order restraining speech by parties or attorneys (1) without conducting a hearing to balance the rights of free speech and fair trial, (2) without making specific findings of fact, and (3) without issuing a precise and narrowly-tailored order. See Pet. for Cert. 14-17. In Michigan, however, a trial judge may restrain speech by parties and attorneys simply by referring to Rule 3.6 in the middle of a colloquy on other issues.

This case dramatizes the importance of the conflict. The Comments to the Michigan Rule recognize that "ordinarily" an attorney should not make public statements about a prior conviction or about evidence that has been excluded from the trial. App. 104a. But the word "ordinarily" implies that there are exceptions. Among those exceptions, a court or discipline board might determine that comments about particular evidence was warranted because of the importance of those facts to public debate, because the comments covered matters that

were already a matter of public discourse, or because the comments were necessary in order to describe the nature of a pending appeal. App. 105a-106a.

In this case, however, the trial court conducted no hearing and entered no findings of fact. It is thus not clear that the trial judge *ever balanced* the interests at stake. If he did, there is no clear determination that can be reviewed by this or any other court. In fact, because the trial court issued its "order" so casually, there is not even a finding as to who said what and why.

Finally, as will be discussed in more detail below, the trial court's failure to specify *who* was restricted from saying *what* to *whom* meant that the *only* standard the parties had to govern their conduct was Rule 3.6 and its Comments—standards that are identical to those that this Court found void for vagueness in *Gentile v State Bar of Nevada*, 501 U.S. 1030, 1048-1049, 1082 (1991).

The procedure approved by the Michigan Supreme Court majority is extremely dangerous. If a trial court can dismiss a case because a lawyer, or still worse, a party, purportedly violated a vague standard proclaimed without a hearing and without specific findings of fact to support it, speech is more severely restricted than under a ". . . a deliberate statutory scheme of censorship . . ." because at least under a system of censorship a lawyer or party would have "an authoritative guide to the permissible scope of comment, instead of being compelled to act at the peril that judges might find [that] an utterance" had violated Rule 3.6. *Bridges v State of California,* 314 U.S. 252, 269 (1941).

The issue at stake is not a "fact-bound application of *Gentile*," as Ford would have it (Ford Br, p. 16). The issue at stake is the minimal procedures that a state must adopt in order to ensure that the rights guaranteed by *Gentile* and *Bridges* are actually protected.

Until this Court grants the writ and resolves the conflict between Michigan and all other jurisdictions, speech in Mich-

igan will remain in a deep freeze as the threat of peremptory dismissal continues to hang over the head of every party and every lawyer who considers speaking out about an issue of public concern that arises in a legal case in the state courts of Michigan.

II. THE DECISION OF THE MICHIGAN SUPREME COURT CONFLICTS WITH THE DECISIONS OF THIS COURT AND OF SIX FEDERAL CIRCUITS AND FIVE STATE SUPREME COURTS BECAUSE IT PUNISHES SPEECH UNDER STANDARDS THAT ARE UNDENIBALY VOID FOR VAGUENESS.

Before a court restricts First Amendment rights, it has an *obligation* to tailor an order "as precisely as possible to the exact needs of the case." *Carroll v President and Commissioners of Princess Anne*, 393 U.S. 175, 184 (1968). In this case, however, the trial judge *refused* to tailor the order to the specific facts of this case, saying "I think I don't have the right to decide for myself what a lawyer can say to the public." App. 38a.

Having, however, refused to specify what a lawyer could say beforehand, the trial judge then dismissed the case because counsel (and the plaintiff) guessed wrong about how the trial court would later interpret Rule 3.6.

On appeal, the four-Justice majority of the Michigan Supreme Court backed up the absence of *any* order saying that "Even without an *explicit* [i.e. clear] order precluding plaintiff and her counsel from publicizing Bennett's excluded conviction, [the trial judge] chose a principled course in dismissing plaintiff's case to protect the administration of justice." App. 21a (emphasis added).

Ford supports this "procedure."

As to Maldonado, Ford claims that because she was in the courtroom when the trial judge referred to the ethical obligations, she was ". . . clearly put on notice that any violation of ethical obligations . . . could result in the dismissal of the

case with prejudice." Ford Br, at 7. But if the clear terms of ethical obligations do not apply to Maldonado, hearing a reference to those obligations does not put her on notice that she has to comply with them.

As to counsel, Ford does not suggest how an "order" issued in May 2002 provided notice as to a press release issued in September 2001. Nor does Ford say how Rule 3.6 provided notice to counsel as to the speech that was proscribed, when this Court had previously held that an identical rule was void for vagueness in the precise ways that are at issue here. See Pet. For Cert. 19-21.[1]

Ford, of course, claims that this is "simply incorrect," because "*Gentile* did not strike down the Nevada Rule as void for vagueness," but rather "held only that the rule was vague as applied to the specific speech in that case." Ford Br., at 22. But that statement is not only wrong—it is deliberately dishonest.

At the exact pages cited in the Petition for Certiorari, Justice Kennedy stated: "As interpreted by the Nevada Supreme Court, the Rule is void for vagueness . . ." *Id.*, 501 U.S. at 1048. And Justice O'Connor stated: "I believe that Nevada's Rule is void for vagueness." *Id.*, 501 US at 1082.

In fact, if anything, there is an additional factor, apparent in the text of the Michigan Rule, which makes it vaguer than the Nevada Rule that was found void for vagueness in *Gentile*. In this case, unlike most of the comments in *Gentile*, the speech at issue refers to matters that are contained in one or more public records.[2] Contrary to Ford's claim that attorneys

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[1] Ford does not dispute that the Nevada Rule at issue in *Gentile* is essentially identical to the Michigan Rule and its accompanying Comments. Compare the Nevada Rule, *Id.*, 501 U.S. at 1060-1061, with the Michigan Comments. App. 103a-106a.

[2] Ford claims that Bennett's conviction was not a public record because it was sealed in November 2001 (Ford Br. 25). But the only statement to the media by counsel about Bennett's conviction was made in September 2001. Similarly, Ford claims that Bennett's conviction and the facts that

may not speak on matters that are already part of the public record (Ford Br. 24), the Comments to the Michigan Rule specifically recognize that counsel have a safe harbor, founded on the decisions of this Court,[3] allowing them to comment on information contained in a public record, "notwithstanding" any other provision of the Rule. App. 105a.

As with all vague standards, the trial court's reference to Rule 3.6 had all the faults of a vague restriction on speech.

The plaintiff and her attorneys had no standard to govern their conduct.

Nor did the courts and disciplinary boards have any standards to regulate the enforcement of this Rule. Michigan's Attorney Grievance Commission and three Justices of the Supreme Court found that counsel had committed no violations of the ethical rules. App. 43a, n. 7. The trial judge and the Supreme Court majority, however, found that plaintiff's counsel had committed numerous violations of those same rules.

In fact, the lack of standards would be comical, if it were not so serious. At various times, the trial court or the majority found, or seemed to find, that counsel or the plaintiff had violated the judge's "order" by appearing in broadcasts where others talked about the conviction, by being present when third parties distributed leaflets discussing the conviction, by failing to dissuade third persons from distributing those leaflets, by stating that metro Detroit has a "company town feeling," by providing documents [i.e. pleadings] to a reporter, by "telling" a hundred friends, family members, co-workers and

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gave rise to it are not a public record because judicial records are not subject to the state Freedom of Information Act (Ford Br. 25). But surely when any member of the public could read about Bennett's conviction in the files of six courts in Michigan, including the Michigan Supreme Court, the information is in a "public record" for purposes of Rule 3.6, even if it is not for purposes of the state Freedom of Information Act.

[3] *Cox Broadcasting Corp v. Cohn*, 420 U.S. 469, 496 (1975); *Landmark Communications v. Virginia*, 435 U.s. 829 (1978).

others about Bennett's conviction, and by issuing a press release months before the judge even issued the "order." App. 20a-24a; 83a-89a.

Finally, and as always, the vague "order" opened the way to discriminatory enforcement. The trial court and the Supreme Court majority found that Bennett's counsel had *not* violated the "order" when he called every woman who sued Bennett a greedy liar who was attempting to capitalize on Bennett's conviction. App. 8a, 40a-41a. But the same courts found Maldonado's lawyers had violated the "order" when they did not even refer to the conviction. App. 23a-24a.

"The history of liberty has largely been the history of observance of procedural safeguards." *McNabb v United States*, 318 U.S. 332, 347 (1943)(Frankfurter, J.). In implementing that profound directive, this Court as long held that "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v Button*, 371 U.S. 415, 483 (1963).

As Michigan has now thrown that vital protection to the winds, this Court should grant the writ so that Michigan's application of the First Amendment can be brought into compliance with the standards that this Court has applied for over a half century—and that every other jurisdiction has long recognized as essential if liberty is to be preserved.

III. THE MAJORITY OF THE MICHIGAN SUPREME COURT WRONGLY DISMISSED THIS CASE ON THE BASIS OF SPEECH THAT WAS PROTECTED BY THE FIRST AMENDMENT.

Ford concludes its brief by attempting to wrap itself in the mantle of a fair trial. Ford Br. 20-21.

But Ford never sought a fair trial. It never complained about the September 11 press release; never filed a motion asking for an order restricting speech; never asked for a postponement; never asked for a change of venue; never asked for special voir dire; and never asked for sequestration. Instead of doing *anything* to secure a fair trial, Ford used speech as an

excuse to get no trial. And that is what the Michigan Supreme Court majority gave it—not a fair trial, but no trial.

In attempting to sustain that dismissal, Ford and the Michigan Supreme Court majority now employ arguments that should command the attention of this Court.

To make up for the fact that the plaintiff and her counsel actually made *one* statement each to the media about Bennett's conviction, the majority of the Michigan Supreme Court held Maldonado and her attorneys responsible for *every* media statement about Bennett's conviction—even though the conviction and the facts underlying it were in the public files of six courts and two police departments and were in the pages of the *New York Times* and the *Detroit Free Press*. App. 4a, n. 5; 6a, n. 9.

Similarly, in its brief, Ford makes explicit the premise of the Michigan Supreme Court's decision. According to Ford, once the trial court excluded evidence of Bennett's conviction and the facts underlying it, Maldonado's attorneys could *never* say anything to the media about those facts, no matter how great the First Amendment interests may be and no matter what exceptions there were in Rule 3.6:

> Here, once the trial court ruled that Bennett's prior conviction was inadmissible, petitioner and her counsel had no right to undermine that evidentiary ruling by publicizing the conviction through the media.

Ford Br. at 24.

There is no support for that claim. See Pet. for Cert. 23-25.

Finally, Ford makes explicit yet another unspoken premise of the majority opinion of the Michigan Supreme Court. According to Ford, Maldonado and her attorneys had no right even to be present at a peaceful rally on her behalf because someone else might pass out a leaflet that referred to Bennett's conviction:

> From Rule 8.4(a), petitioner and her lawyers knew, for example, that they should not have taken part in the June 26, 2002, "Justice for Justine Committee" demonstration at which "participants distributed leaflets to the public

containing information regarding Bennett's expunged conviction."

Ford Br., 25-26.

According to Ford—and the Michigan Supreme Court, App. 24a—because lawyers may not make certain statements, Rule 8.4(a) requires then to restrain their clients and third parties from making those statements. *Gentile's* narrow restriction on comments to the media *by lawyers* has been converted into an obligation on lawyers to enforce restrictions on their clients that do not even apply to them.

Instead of enforcing the First Amendment "as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow," *Bridges, supra*, 314 U.S. at 263, Ford asks this Court to sustain a construction of that Amendment that requires counsel to do everything possible to suppress public discussion.

As Ford's brief makes clear, one of the largest corporations in the world rightly believes that the Supreme Court of Michigan has declared war on the First Amendment. As this Court has done so many times before it should grant the writ and strike down the Michigan Supreme Court's outlandish and unprecedented attack on First Amendment rights.

CONCLUSION

The petitioner Justine Maldonado requests that this Court grant her petition for a writ of certiorari.

Respectfully submitted,

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